VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by NEWMAN
Commissioner

Dec. 15, 2015

PHILLIP DWAYNE STILTNER v. PIKE ELECTRIC, INC.
LIBERTY INSURANCE CORPORATION, Insurance Carrier
LIBERTY INSURANCE CORPORATION, Claim Administrator
Jurisdiction Claim No. VA00001006840
Claim Administrator File No. 80DC48047
Date of Injury: October 17, 2014

Christopher C. Booberg, Esquire
For the Claimant.

Patricia C. Arrighi, Esquire
For the Defendants.

REVIEW on the record by Commissioner Marshall, Commissioner Newman, and Chief Deputy Commissioner Szablewicz[1] at Richmond, Virginia.

The claimant requests review of the Deputy Commissioner's July 20, 2015 Opinion denying his Claim for Benefits. We AFFIRM.

I. Material Proceedings

On December 30, 2014, the claimant filed a Claim for Benefits alleging he sustained compensable injuries on October 17, 2014, when he was involved in a motor vehicle accident. He sought medical benefits and an open and continuing award of temporary total disability benefits. The claim was defended on the grounds the claimant's injuries did not occur within the course of his employment.

[1] Pursuant to Va. Code § 65.2-705(D), the Chief Deputy Commissioner participated on this panel by designation of the Chairman.

The Deputy Commissioner summarized the facts surrounding the claimant's accident and injuries as follows:

> Claimant worked as a "groundsman" for the defendant enterprise. His friend, Mr. Floyd Ramsey Sims was employed as an operator. As credibly explained by claimant, together the two would travel, by personal vehicle, roughly 350 miles — a drive spanning approximately seven hours — to the employer's Manassas, Virginia, work site. Work would begin Tuesday morning, ending Friday afternoon. They would lodge in a hotel Monday night through Friday morning and the employer provided each, separate from wages earned, a per diem — $55 for each day worked.
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> Claimant indicated he and Mr. Sims would apply the per diem to chiefly offset lodging and fuel costs. According to Mr. Dean Brooks, an area supervisor engaged by the employer, the per diem was offered to those employees traveling more than eighty-one miles to the work site. As Mr. Brooks explained, the employees could direct the per diem freely and without an employer-directed convention. The area supervisor described the per diem as remuneration for costs incurred by those employees unable to commute from and to their homes — for those working distantly; beyond the established eighty-one mile radius.
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> According to Mr. Brooks, employees were not "paid" or reimbursed for "mileage" traveled. Employee wages were determined by hours worked; a tally beginning, daily, when arriving at the appointed work site, ending when departing the workplace.
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> On October 17, 2014, their work week completed, claimant and Mr. Sims were traveling, toward their homes — Mr. Sims, a passenger, resided in Swords Creek, Virginia; claimant, the driver, a resident of Doran, Virginia. The friends would, according to claimant, "share the driving" of Mr. Sims's vehicle. Navigating upon U.S. Route 460, westbound, near Giles, Virginia, several hours after departing the workplace, their vehicle was struck by another. Claimant suffered significant injuries. Tragically, Mr. Sims died from encountered blunt trauma.

(Op. 3-4.)

After reviewing the testimony and evidence in the record, the Deputy Commissioner made the following findings and rulings of law:

> [G]iven the totality of the evidence, guided by Mr. Brooks, it appeared the per diem was, for the employer, an attempt to balance the expense faced by those

> toiling distantly—for the costs associated with securing, for example, shelter, meals, features ordinarily afforded, if fortunate, by and within one's home.
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> . . . Without sufficient evidence proving the time consumed going to and from work was paid for by the employer or included within claimant's wages, we cannot conclude claimant remained within his employment course when injured.
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> . . . .
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> We are ever mindful that our governing Act is highly remedial and shall be liberally construed in favor of the injured worker. . . . We cannot, upon the evidence adduced, conclude the tragic accident described here occurred within claimant's October 17, 2014 employment course. Without evidence establishing this critical element, we cannot properly grant claimant the relief he pursued.

(Op. 7-8.)

The claimant filed a timely request for review by the full Commission. The claimant argues the distance between his residence and workplace indicates the per diem compensation he received was intended to be used for travel expenses, and because such compensation benefited both the claimant and the employer, it created an exception to the "coming and going" rule and brought the accident within the course of his employment. The defendants argue the claimant's per diem was not intended for one specific purpose, he was paid only for time spent working rather than traveling, and as a result, the accident did not occur in the course of employment.

II. Findings of Fact and Rulings of Law

To be compensable, an injury by accident must arise out of and in the course of employment. Va. Code § 65.2-101; Cty. of Chesterfield v. Johnson, 237 Va. 180, 183, 376 S.E.2d 73, 74 (1989). "An accident occurs 'in the course of the employment' when it takes place within the period of the employment, at a place where the employee may reasonably be, and while he is reasonably fulfilling duties of his employment or engaged in doing something

incidental thereto." Bradshaw v. Aronovitch, 170 Va. 329, 335, 196 S.E. 684, 686 (1938) (citations omitted).

As a general rule, an accident that occurs while the claimant is coming to or going from the workplace is not considered to occur in the course of employment. In Sentara Leigh Hospital v. Nichols, 13 Va. App. 630, 414 S.E.2d 426 (1992), the Court of Appeals of Virginia held:

> [A]n injury sustained while traveling to or from work is generally not compensable. An accidental injury sustained when the employee is "going to" work does not arise "in the course of" the employment simply because the employee at that time and place is not yet "on the job." There are, however, three exceptions to this rule: (1) where the means of transportation used to go to and from work is provided by the employer or the employee's travel time is paid for or included in wages; (2) where the way used is the sole means of ingress and egress or is constructed by the employer; and (3) where the employee is charged with some duty or task connected to his employment while on his way to or from work.

Id. at 636, 414 S.E.2d at 429 (citations omitted).

The claimant argues the first exception to the "coming and going" rule is applicable in the present case. "[I]njuries sustained during the course of travel are compensable . . . whenever the employer, . . . agrees to provide the employee . . . wages or salary for the time spent in travel required by the work; or to reimburse the employee expenses incurred in the operation of his own vehicle in the performance of his duties. . . ." Provident Life & Accident Ins. Co. v. Barnard, 236 Va. 41, 47, 372 S.E.2d 369, 372-73 (1988). However, a claimant's receipt of a fixed per diem payment which has no relationship to expenses actually incurred will not be sufficient to bring an injury in the course of employment.

In Pettus v. Stone & Webster Engineering Corp., 55 O.I.C. 281 (1973), a contractor was fatally injured in a motor vehicle accident that occurred when he was driving from his residence

to a job site. Ordinarily he was paid by the hour, but a union contract also "provided that, under certain circumstances, the 'travel expense' of its members might be negotiated on a job-to-job basis." Id. at 282. At the time of his accident, the decedent was receiving an additional $5 per day in "travel expense," but he did not have to prove "that he actually expended it in traveling to and from work," and the employer "had no control over his travel to and from the job site." Id. The Commission found his per diem "was not based on mileage or time, and the payment bore no relationship to actual travel expense." The transportation allowance was, in fact, additional compensation, not a payment made by the employer in lieu of furnishing transportation," and as a result, it did not create an exception to the "coming and going" rule. Id. at 285.

Pettus was cited with approval by the Supreme Court of Virginia in GATX Tank Erection Co. v. Gnewuch, 221 Va. 600, 272 S.E.2d 200 (1980). In that case, the Supreme Court reviewed the Commission's award of benefits to a claimant whose truck was struck by a train while he was returning home at the end of a workday. The Commission found the claimant proved his injuries occurred in the course of employment in part because he "was allowed an extra payment for each day of travel. . . ." Id. at 603, 272 S.E.2d at 202. While the award was affirmed because "the way used in going to and from work was the sole and exclusive means of ingress and egress," Id. at 603, 272 S.E.2d at 202-03, the Court also held:

> [T]he award cannot be justified under the first exception. The payment of $ 6 per day did not qualify as payment for the time consumed in travel. It was not related to travel time, distance travelled, or the transportation expense actually incurred by the employee. The payment was not reimbursement of travel expense, but was additional compensation to attract skilled workers to a remote jobsite. . . .

Id. at 604, 272 S.E.2d at 203.

In this case, the claimant received an additional $55 for each day he worked because the job site was located more than 81 miles from his residence. This additional sum was meant to compensate employees for the cost of travel or overnight stays. However, the claimant was not required to account for how he spent this sum. The employer exercised no control over the claimant's travel to and from the remote work site. The claimant received the per diem only on days he worked; he received no compensation, wage or otherwise, for the time he spent travelling to the work site on Monday. The per diem was a fixed amount unrelated to the actual expenses an employee incurred while travelling, and the amount did not increase regardless of how much farther than 81 miles an employee lived from a job site. As was the case in Gnewuch and Pettus, we find the claimant's per diem served as "additional compensation to attract skilled workers to a remote jobsite," and not a payment made "in lieu of furnishing transportation." Accordingly, we do not find the claimant's accident occurred in the course of his employment.

III. Conclusion

The Opinion below is AFFIRMED.

This matter is hereby removed from the review docket.

APPEAL

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of Virginia within 30 days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerks' Offices of the Commission and the Court of Appeals of Virginia.